IN THE

Supreme Court of the United States

NOV 19 1951

OCTOBER TERM, 1951.

No. 434

JULIUS GENDELMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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IN THE

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OCTOBER TERM, 1951.

No. .....

JULIUS GENDELMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Petitioner, Julius Gendelman, respectfully petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review a Judgment of that Court entered on October 19, 1951. The Transcript of Record is supplied herewith, pursuant to Rule 38 of this Court.

Statement of Matter Involved.

Petitioner was convicted after trial before a jury in the United States District Court for the Southern District of California on July 19, 1950, on each of two counts of an indictment charging him with violations of 26 U. S. C. A., Section 145(b) [R. 15]. Count I charged that petitioner filed a false income tax return for the calendar

year 1943, in which he stated that his net income on a community property basis was $2,593.38 and the tax thereon was $401.25, whereas his income for such year was $10,839.90 and the tax thereon was $2,913.85 [R. 3]. The total tax that petitioner was alleged to have failed to report was $2,512.60. Count II charged that petitioner attempted to evade and defeat the income taxes of his wife for the same year in a similar amount [R. 4].

The Court sentenced petitioner to imprisonment for a period of ten months in jail on each of Counts I and II, the periods of confinement to begin and run concurrently [R. 15, 16].

The Government attempted to prove its case by the so-called "bank deposit theory" and the net worth-expenditure method. The case was predicated primarily upon the testimony of a revenue agent, who computed the total of the deposits in various bank accounts in 1943, some in the names of concerns owned by petitioner, five in the name of his wife, five in the name of Esther Chochem (petitioner's aunt), one in the name of petitioner's cousin, and one in the name of Super-Built Furniture Manufacturing Company (which petitioner's aunt claimed she owned) [R. 462, 467, 537].

The revenue agent included in such deposits expenditures for the purchase of properties by various persons other than petitioner [R. 465, 466, 519, 551, 574]. The revenue agent also designated these items as "deposits," although they were not deposited in any of the bank accounts concerned [R. 573]. The revenue agent then reduced the total of such deposits and expenditures by what he designated as "eliminations," which purportedly covered exchanges, redeposits, and the cost of doing business [R. 467-470, 475]. By this method he arrived at a

figure which he claimed to be the net income of petitioner and his wife, from which he computed the tax which he claimed was owed by each [R. 475].

The total designated by the revenue agent as deposits was $144,976.05 [R. 467]. Of this amount he designated $96,562.49 as actual deposits in various bank accounts [R. 537]. The balance of $48,413.56 was made up of four deposits to the bank account of Modern Furniture and Upholstering Co., Inc., a corporation in which petitioner owned stock [R. 549, 550); various amounts paid into escrows by persons other than petitioner in connection with the purchase of operating businesses [R. 466, 467, 519, 551, 574]; and one item of $3,485.00, which was an entry in the books of Super-Built Furniture Manufacturing Co. for autos and trucks [R. 465].

Petitioner, an immigrant, was reared by his uncle and aunt, Mandel and Esther Chochem [R. 221]. Both were born in Europe and came to Los Angeles, California, about 1943 [R. 230, 231]. They barely speak English, and neither can read or write [R. 237, 320]. Petitioner was a resident of Los Angeles during the calendar year 1943 and was engaged in various phases of the furniture business [R. 235, 236, 237].

The returns of petitioner and his wife for the year 1943 were prepared by an accountant, who obtained the information to make out such returns from books and records of various companies [R. 158, 159]. He did not recall ever having discussed the returns with petitioner [R. 161]. The revenue agent was assigned to investigate the case in March, 1946, and what records he found of the various companies were in a mixed-up condition and some were missing [R. 326, 329, 368].

For the purpose of substantiating his computations based upon the alleged deposits and expenditures and to prove the total net income of petitioner and his wife, the revenue agent was allowed to testify, over the objection of petitioner, that he had computed the net worth of petitioner as of January 1, 1943, to be $15,031.67, that petitioner's net worth was $48,130.94 at the end of 1943, and that the difference of $33,099.27 represented the increase in petitioner's net worth for that year [R. 601, 605]. This testimony was admitted without any evidence whatsoever to show how he arrived at the net worth of petitioner, either at the beginning or at the end of 1943 [R. 605]. Nor did he in his testimony on direct examination list any assets or liabilities of petitioner whatsoever [R. 605].

On cross-examination, the revenue agent admitted that he had set up no liabilities against petitioner in computing his net worth for 1943, except the indebtedness on his home [R. 628]. He also admitted that he had not examined the books and records of four business concerns which the Government contended were owned by petitioner [R. 370, 371]. He also testified on cross-examination that he treated various moneys deposited to the account of Modern Corporation as assets of petitioner, despite the fact that he admitted that the corporation's income tax return reconciled with its books and records [R. 414].

The evidence introduced during the cross-examination of the revenue agent and before the Government rested its case was uncontradicted that various sums of money, totalling $22,230.92, were advanced to petitioner by the Chochems in 1943 [Ex. B, R. 74, 522; Ex. 8, R. 44, 519, 520, 521, 522; Ex. F, R. 257, 255, 256; Ex. G, R. 346;

Ex. H, R. 499-501; Ex. O, R. 526, 525, 527; Ex. Q, R. 596, 594, 595]. All of these advances or loans were treated by the revenue agent as assets of petitioner in computing petitioner's net worth, but the revenue agent did not set up any liabilities whatsoever for the repayment of such loans [R. 630]. The revenue agent did not mention the loans comprising the $22,230.92 on direct examination [R. 605]. On cross-examination he endeavored to justify his failure or refusal to list such loans or liabilities in his net worth computations upon his interpretation of the bank deposit theory [R. 528, 529]. He stated several times in his testimony that when he could not trace or determine the source of money, he set up such money as income to petitioner [R. 527, 528, 529, 572, 573, 574, 596].

For example, he was shown Exhibit O [R. 526], which was a check for $2,000.00 from Ben's Furniture Co. and which was deposited in an escrow for the purchase of a house by petitioner's wife and her mother [R. 526, 527]. Upon being asked if it were not true that because he did not know where the money came from, he set it up as income to petitioner, he replied:

> "That is the basis on which the deposits theory works" [R. 528].

Regarding another item of $7,000.00, he testified he did not have the slightest idea as to the source of the money, so he set it up as income to petitioner [R. 574].

The revenue agent also contended in his testimony that under the bank deposit theory he had to treat all loans to petitioner during 1943 as income in that year unless it was shown that such loans were repaid to the lender during the year 1943 [R. 572, 574, 575].

Of the $22,506.16 contended by the revenue agent to have been the net income of petitioner and his wife for 1943, the $22,230.92 advanced to petitioner by the Chochems accounted for all but $275.24.

Jurisdictional Statement.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, Chapter 646, 62 Statutes 928 (28 U. S. C. A., Sec. 1254), which provides that cases in the courts of appeals may be reviewed by this Court by writ of certiorari granted upon the petition of any party to a criminal case, before or after rendition of judgment.

The Court of Appeals for the Ninth Circuit has affirmed a judgment of conviction against petitioner for income tax evasion, which petitioner claims is erroneous and contrary to law.

Questions Presented.

1. Does the Government shift the burden of proof to a defendant in a criminal income tax case where the prosecution attempts to prove its case by the net worth-expenditure method and the only proof of net worth offered by the prosecution is the testimony of a revenue agent, who merely states his bald conclusion of what the defendant's net worth was at the beginning and end of the year in question, without testifying as to how he arrived at such net worth and without offering any testimony whatsoever as to what assets and liabilities were used to compute such net worth?

2. In prosecuting a criminal income tax case upon the bank deposit theory and the net worth-expenditure method, is evidence of income sufficient to put the case to a

jury where the only testimony offered to prove income is that of a revenue agent who testifies that since he could not determine the source of certain bank deposits and expenditures, he treated such items as income, and those items comprise the alleged income upon which the case is predicated?

3. Where there is uncontradicted evidence that the deposits and expenditures treated by the revenue agent as income were actually loans to defendant, may the prosecution sustain its case upon the testimony of the revenue agent that under the bank deposit theory he is compelled to treat all such loans as income to the defendant during the year in question unless such loans are shown to have been repaid to the lender in such year?

Reasons Relied on for the Allowance of the Writ.

1. The decision of the Court of Appeals for the Ninth Circuit in the instant case is in conflict with the decisions of at least two other circuit courts of appeals respecting the degree of proof required in a criminal income tax case to establish guilt by evidence of net worth and expenditures. Those cases are: *Bryan v. United States*, 5th Cir. (1949), 175 F. 2d 223 (certiorari granted, affirmed (1949) 338 U. S. 552, 94 L. Ed. 335, 70 S. C. 317; *United States v. Fenwick*, 7th Cir. (1949), 177 F. 2d 488.

2. The Court of Appeals for the Ninth Circuit in the instant case has affirmed a judgment of conviction by a decision which is in conflict with applicable decisions of this Court, in that such decision of the Court of Appeals for the Ninth Circuit determined that in a criminal case the burden of proof shifted to the defendant to establish that deposits and expenditures were not income when the

revenue agent had classified them as income because he could not determine their source.

3. The decision of the Court of Appeals for the Ninth Circuit in the instant case nullifies the rule requiring the prosecution in a criminal case to prove guilt beyond a reasonable doubt, and shifts to the defendant the burden of explaining deposits and expenditures which the Government has treated as income because their source could not be determined, and has thus so far departed from, and sanctioned a departure by the lower court from, the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, your petitioner respectfully prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

CHARLES H. CARR,
Attorney for Petitioner.

Dated: November 15, 1951.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. .....

JULIUS GENDELMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Opinion of the Court Below.

The opinion of the Court of Appeals for the Ninth Circuit, rendered on October 19, 1951, is unreported, and it appears in the record at page 706.

Jurisdiction.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, Chapter 646, 62 Stats. 928 (28 U. S. C. A., Sec. 1254), which provides that cases in the courts of appeals may be reviewed by this Court by writ of certiorari granted upon the petition of any party to a criminal case, before or after rendition of judgment.

The Court of Appeals for the Ninth Circuit has affirmed a judgment of conviction against petitioner for income tax evasion, which petitioner claims is erroneous and contrary to law.

Statement of the Case.

There has been set forth in the Petition a concise statement of the case, containing all that is material to the consideration of the questions presented; and so that this brief shall be direct and concise, the statement will not be repeated here.

Specification of Errors.

I.

The Court of Appeals for the Ninth Circuit erred in affirming the judgment of conviction of petitioner on both Counts I and II of the indictment and in upholding the ruling of the lower court denying petitioner's motion, made at the close of the Government's case and renewed at the close of petitioner's case, pursuant to Rule 29 of the Federal Rules of Criminal Procedure, for a judgment of acquittal on each of Counts I and II, on the ground that the evidence was insufficient to support a verdict, if one should be rendered against petitioner [R. 652, 660].

A. Specifically, the Court of Appeals for the Ninth Circuit erred in holding that the evidence was sufficient to go to the jury where the only evidence offered to prove the alleged income upon which the case was predicated consisted of bank deposits and expenditures which the revenue agent testified he treated as income because he could not determine the source of such bank deposits and expenditures.

B. Specifically, the Court of Appeals for the Ninth Circuit erred in holding that the evidence was sufficient

to go to the jury where the only evidence offered to prove the alleged income upon which the case was predicated consisted of bank deposits and expenditures which the uncontradicted evidence showed were actually loans to petitioner but which were treated by the revenue agent as income because he could not determine the source of such deposits and expenditures.

C. Specifically, the Court of Appeals for the Ninth Circuit erred in holding that the evidence was sufficient to go to the jury where the only evidence offered to prove the alleged income upon which the case was predicated consisted of bank deposits and expenditures which the uncontradicted evidence showed were actually loans to petitioner, but which the revenue agent testified on cross-examination he was compelled to treat as income, under the bank deposit theory, unless they were shown to have been repaid during the year in question.

II.

The Court of Appeals for the Ninth Circuit erred in affirming the judgment of conviction of petitioner on both Counts I and II of the indictment and in upholding the ruling of the lower court permitting the revenue agent to testify that petitioner's net worth on January 1, 1943, was $15,031.67 and at the end of 1943 was $48,130.94, over the objection of petitioner that the computations were not based upon any evidence which had been offered in the trial, were mere conclusions of the witness, and would be prejudicial to petitioner [R. 602, 603, 605].

ARGUMENT.

SPECIFICATION OF ERROR I.

The Court of Appeals for the Ninth Circuit Erred in Affirming the Judgment of Conviction of Petitioner on Both Counts I and II of the Indictment and in Upholding the Ruling of the Lower Court Denying Petitioner's Motion, Made at the Close of the Government's Case and Renewed at the Close of Petitioner's Case, Pursuant to Rule 29 of the Federal Rules of Criminal Procedure, for a Judgment of Acquittal on Each of Counts I and II, on the Ground That the Evidence Was Insufficient to Support a Verdict, If One Should Be Rendered Against Petitioner [R. 652, 660].

A. Specifically, the Court of Appeals of the Ninth Circuit Erred in Holding That the Evidence Was Sufficient to Go to the Jury Where the Only Evidence Offered to Prove the Alleged Income Upon Which the Case Was Predicated Consisted of Bank Deposits and Expenditures Which the Revenue Agent Testified He Treated as Income Because He Could Not Determine the Source of Such Bank Deposits and Expenditures.

The Government in this case attempted to prove that petitioner was guilty of evading his income taxes for the calendar year 1943 in the amount of approximately $2,500.00 by the so-called bank deposit theory and the net worth-expenditure method. Upon the premise that all of the bank accounts referred to in the evidence were in fact bank accounts of petitioner, the revenue agent computed the total deposits in such bank accounts during the year 1943 at $96,562.49 [R. 462, 537]. To this he added the sum of $48,413.56, which he classified as "additional income" [R. 553]. This made a grand total of $144,-

976.05, which he designated as "deposits" [R. 467]. He then deducted $121,502.24, which he designated as "total eliminations" [R. 600]. This left a figure of $23,473.81, designated by the revenue agent as "additional income before certain allowances" [R. 470-475]. These allowances amounted to $967.65, leaving $22,506.16 as the amount claimed by the revenue agent to be net income [R. 475].

Included in what the revenue agent designated as deposits were six items amounting to $22,497.00, which were not deposited in any bank account and which consisted of the following:

1.	An entry on the books of Super-Built Furniture Manufacturing Co. for autos and trucks [R. 465] in the amount of	$ 3,485.00
2.	An entry on the books of Super-Built Furniture Manufacturing Co. as "loans payable to C & G Merchandising Co. [R. 465] in the amount of	1,500.00
3.	An amount paid into an escrow for the purchase of a company named "L. A. Mode" [R. 572] in the amount of	2,500.00
4.	An amount paid into escrow for the purchase of Super-Built Furniture Manufacturing Co. [R. 466, 551, 574] in the amount of	7,000.00
5.	An amount paid into escrow for the purchase of a duplex on Genesee Street [R. 467, 574, 575] in the amount of	5,000.00
6.	An amount paid into escrow by Esther Chochem for the formation of a partnership called "Allied Furniture Co." [Ex. G, R. 356] in the amount of	3,012.00
	Total	$22,497.00

Since the total of these items is $22,497.00 and it will be shown that the evidence was insufficient to support the Government's contention that they were actually income to petitioner, it is submitted that the motion for judgment of acquittal on both counts of the indictment should have been granted by the lower court. This is so because the amount of $22,497.00 would more than account for the additional unreported income claimed by the revenue agent.

Petitioner contended in the lower Court, and still contends, that the evidence was wholly insufficient to support the Government's claim that the six items totalling $22,-497.00 were income to petitioner. The evidence introduced during the Government's case fully supports this conclusion, as will appear from the references to the record respecting each and every item hereinafter set forth.

The first item of $3,485.00, which was an entry on the books of Super-Built Furniture Manufacturing Co. for autos and trucks, was finally conceded by the revenue agent to have been incorrectly included as income of petitioner for the year 1943 [R. 571, 572]. This is an outstanding example of the misapplication of the so-called bank deposit theory by the revenue agent.

The revenue agent testified respecting the $3,485.00 as follows:

> "That again is included here as income because the analysis of these bank accounts did not show where any such amount of money could have come from." [R. 465.]

He conceded the error on cross-examination, when his attention was directed to Exhibit I, the journal of Super-Built Furniture Manufacturing Co., wherein it was shown

that originally the autos and trucks cost $3,850.00 and that they had been depreciated down to $365.00. Thereafter they were again written up to a figure of $3,485.00, apparently for credit purposes [R. 507, 510, 511].

The second item of $1,500.00, which was an entry on the books of Super-Built Furniture Manufacturing Co. as loans payable to C & G Merchandising Co., was included as income to petitioner in the year 1943 [R. 519]. The evidence conclusively showed that the $1,500.00 was actually transferred by check from the B & C Manufacturing Co. to Super-Built Furniture Manufacturing Co. and deposited in its account.

The B & C Manufacturing Co. was owned by the Chochems [R. 581]. Exhibit B [R. 74] which was the bank statement of the B & C Manufacturing Co. at the Bank of America, showed the withdrawal of the $1,500.00, and Exhibit 8, a deposit slip of Super-Built for November 19th, 1943, shows the $1,500.00 item deposited in its account [R. 44, 519-524]. This was obviously one of the advances made by the Chochems, as testified to by Esther Chochem [R. 255-257].

The revenue agent testified that he did not know what the $1,500.00 represented, but included it as income [R. 572].

The third item of $2,500.00, which was paid into escrow for the purchase of L. A. Mode, was included as income to petitioner in the year 1943 [R. 466, 572]. The escrow statement showed that $2,200.00 of the $2,500.00 came from Charles Christopher, an attorney [Ex. 26, R. 88]. No evidence was introduced to show from whom Christopher received the $2,200.00 which he paid into the escrow or to show whom he represented. Nor did the

evidence show that the entire $2,500.00 paid into the escrow came from any particular bank account or was ever deposited in any bank [R. 573].

The revenue agent testified respecting the $2,500.00 as follows:

> "Q. Do you know where the money came from, the $2,500? A. No, sir.
>
> Q. So you set it up as net income? A. Yes, sir.
>
> Q. That is the theory of a bank deposit case, is it? A. Yes, sir." [R. 572, 573.]

He further testified as follows:

> "Q. Then why do you set the $2,500 up to Julius Gendelman? A. Under the theory of a bank deposit case money doesn't have to be all deposited in banks. The mere fact that money was available in someone's pocket to be deposited shows that the money must have come from some place. . . .
>
> Q. But if it came from somebody like Esther Chochem or Julius Gendelman borrowed it then you wouldn't make that deduction? A. If it were not repaid by the end of the year, yes, sir.
>
> Q. Well, the whole sum and substance is you don't know where the money came from? A. That is correct." [R. 573, 574.]

Here again the revenue agent is including as net income to petitioner $2,500.00 which he admits was not deposited in any bank account of petitioner, nor did the revenue agent have any knowledge whatsoever as to the source of such amount.

The fourth item of $7,000.00, which was paid into escrow for the purchase of Super-Built Furniture Manu-

facturing Co., was included as income to petitioner in the year 1943 [R. 466, 551, 574]. Esther Chochem was the purchaser of this business [Ex. 25, R. 86].

Again in this instance the revenue agent in his computations treated the amount of $7,000.00 as income to petitioner because he could not identify the source of the money. He testified:

> "There was paid into Super-Built escrow the sum of $7,000 and the source of that money was not in the hands of Julius Gendelman—was not known to me. That has also been included in my computation." [R. 466, 467].

Again he testified:

> "Q. The next item is $7,000 paid to Ben Segal in the Super-Built escrow. A. Yes, sir.
>
> Q. You set that up as income to Gendelman? A. Yes, sir.
>
> Q. Do you know where the money came from? A. No, sir.
>
> Q. You don't have the slightest idea, do you? A. At the moment, no, sir." [R. 574.]

As in the case of the three preceding items, the classification of this $7,000.00 as income to petitioner finds no support whatsoever in the record. By classifying such items as income without any knowledge as to their source, the prosecution, through the revenue agent, was in effect shifting the burden to petitioner to prove that such amounts were in fact not income. This a defendant is not required to do. The Government has the burden of proof in a criminal case. That burden never shifts to the defendant, and circumstantial evidence must be of such a character as to exclude every reasonable hypothesis ex-

cept that of guilt. Certainly evidence of the type quoted above does not meet that test.

The fifth item of $5,000.00, which was paid into escrow for the purchase of a duplex on Genesee Street, was included as income to petitioner in the year 1943 [R. 467, 575]. This property was purchased by petitioner's wife and her mother [R. 55].

On cross-examination, the revenue agent testified relative to this item:

> "Q. The frank truth of it is that you didn't know where the money came from so you just set it up as income to Julius Gendelman. Now, isn't that the frank truth of it? A. That is the basis on which the deposits theory works.
>
> Q. I am not asking you about the deposit theory I am asking you about what you did. You just didn't know where the money came from, the $5,000, so you just assumed and set it up to the Gendelmans as income? A. Yes, sir." [R. 528.]

On cross-examination, the revenue agent was shown defendant's Exhibit O, which was a check for $2,000.00 from Ben's Furniture Co. to Charles Furniture Co., and endorsed by Charles Furniture Co., Ben Chochem [R. 526, 527]. Both of these companies were owned by the Chochems [R. 581]. On the back of the check there appeared the number of the Genesee duplex escrow, namely, "ESC 377-1514" [R. 527]. The revenue agent admitted it was the first time he had seen the check, but stated he had in effect treated it as income to petitioner [R. 527-528].

It was obvious that the check for $2,000.00 had been advanced by the Chochems, and under no circumstances

could it be classified as income to petitioner. The $2,000.00 check, Exhibit O, serves to point up the fallacy of the bank deposit theory, as applied by the revenue agent in this case. Here he is treating $5,000.00 as income to petitioner because he does not know the source of the money, when the evidence is uncontradicted that at least $2,000.00 of that amount was a loan made by the Chochems to petitioner's wife and her mother.

The sixth and last item of $3,012.00, which was paid into escrow by Esther Chochem for the formation of a partnership called "Allied Furniture Co.," was included as income to petitioner in the year 1943 [Ex. G, R. 348, 467, 551]. Esther Chochem made a contribution of $3,000.00 in cash to the formation of the partnership [R. 356]. Again the revenue agent testified that since he could not determine from what source this money came, he set it up as a deposit and thereby treated it as income to petitioner [R. 596].

It will be noted that all of the foregoing six items upon which the Government's case was based were classified by the revenue agent as income because in each instance, as he testified, he was unable to determine the source of such funds. The evidence introduced by the Government was insufficient to establish these six items, totalling $22,497.00, as income to petitioner; and as heretofore pointed out, if this sum were eliminated from the additional net income claimed by the revenue agent, there would in fact be no unreported net income.

Viewing the foregoing evidence in the most favorable light for the Government, as the Court is required to do in considering the sufficiency of the evidence on a motion for acquittal, how can it be said that there was substantial

evidence to show that the foregoing items were income to petitioner during the year 1943?

Petitioner was prosecuted for a violation of 26 U. S. C. A., Section 145(b), which provides:

> "Any person . . . who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony. . . ."

The decisions of the Federal Courts are almost unanimous in holding that mere deposits, standing alone, are insufficient to establish income in a criminal case.

In *United States v. Fenwick,* 7th Cir., 177 F. 2d 488, the Court reversed a judgment of conviction for income tax evasion where the Government attempted to establish a case upon the net worth-expenditure basis. The Court said on page 491:

> "As we have said, when the Government relies upon the circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion, it must produce evidence that excludes all possible available sources of taxable income from which the increased net worth and the excess expenditures could have been derived."

In *Kirsch v. United States,* 8th Cir., 174 F. 2d 595, a judgment of conviction was reversed by the Court because the evidence was insufficient to establish taxable income. The Government endeavored there to establish a case against the defendant upon the basis of bank deposits. The Court said on page 601:

> "But the question of whether the fact that a defendant had unreported taxable income may be estab-

lished by the circumstance alone that his checking account at his bank totaled more than the gross income reported by him need not be determined. It may be conceded here, as it was in the Gleckman case, 80 F. (2d) loc. cit. 399, 'that the bare fact, standing alone, that a man has deposited a sum of money in a bank would not prove that he owed income tax on the amount.'"

And the Court said again, on page 601:

"But none of the foregoing considerations will justify the unqualified assumption of a fact as true that is known to be false. The hypothetical question assumed without qualification that all of the deposits in the tavern account and in defendant's personal account constituted income for tax computation purposes. That assumption of fact was not only without evidentiary support even from permissible inference from proven facts, but was definitely disproven by the Government's own evidence."

One of the leading cases which has been cited many times in the decisions of the courts, and which has been relied upon by the Government in many of its prosecutions on the bank deposit theory is that of *Gleckman v. United States*, 8th Cir., 80 F. 2d 394. In this case the Court clearly pointed out at page 399:

"It may be conceded also that the bare fact, standing alone, that a man has deposited a sum of money in a bank would not prove that he owed income tax on the amount; nor would the bare fact that he received and cashed a check for a large amount, in and of itself, suffice to establish that income tax was due on account of it."

In *Bryan v. United States,* 5th Cir., 175 F. 2d 223 (affirmed 338 U. S. 552, 94 L. Ed. 335, 70 S. C. 317), the Court reversed a judgment of conviction for income tax evasion based upon the net worth-expenditure theory. The Court said on page 226:

> ". . . the evidence, in the light of the bill of particulars, was insufficient to make out a *prima facie* case against the Defendant on the net worth-expenditure basis, and the case should not have been submitted to the jury since it did not exclude the hypothesis that the funds used in making some of the expenditures might have been from sources other than current business income."

In *United States v. Berman,* D. C., N. D., Ga., 75 Fed. Supp. 789, Judge Underwood granted a new trial after a conviction for income tax evasion. The Court pointed out that the Government was endeavoring to shift the burden of proof to the defendant, saying, on page 790:

> "The Government took the position that all items on these accounts were properly charged to income where defendant could not give a satisfactory explanation. In other words, placing the burden upon the defendant of proving that they were not income although in a criminal case the Government is required to prove beyond a reasonable doubt that they constituted taxable income and that the failure to return same was willful."

See also *United States v. Chapman,* 7th Cir., 168 F. 2d 997, 1001.

It is submitted that the Government produced no substantial evidence to identify as income the items heretofore discussed, that the evidence was insufficient to put the

case to the jury, and that the lower court should have granted petitioner's motion for a judgment of acquittal on both counts of the indictment. The lower court, in denying the motion upon such evidence, actually shifted the burden to petitioner to prove that such items were not income, when the burden was on the Government to prove the alleged unreported income beyond a reasonable doubt. In a case such as this, where the evidence relating to expenditures was wholly circumstantial, it was incumbent upon the Government to produce evidence which excluded every reasonable hypothesis other than the guilt of the defendant, that is, the proof should have excluded the hypotheses that the funds used in making the expenditures might have belonged to other persons or might have been from sources other than current business income. This the evidence did not do.

B. Specifically, the Court of Appeals for the Ninth Circuit Erred in Holding That the Evidence Was Sufficient to Go to the Jury Where the Only Evidence Offered to Prove the Alleged Income Upon Which the Case Was Predicated Consisted of Bank Deposits and Expenditures Which the Uncontradicted Evidence Showed Were Actually Loans to Petitioner but Which Were Treated by the Revenue Agent as Income Because He Could Not Determine the Source of Such Deposits and Expenditures.

As has been pointed out above, the six items totalling $22,497.00, which made up the additional unreported income claimed by the revenue agent, were not actual deposits but were expenditures of money, by persons for the most part unidentified. In making his computation the revenue agent did not treat any of the expenditures

as advances or loans. He merely included these in what he termed "deposits," because he could not identify their source. There can be no doubt that there were numerous loans by the Chochems to petitioner during 1943. The evidence introduced during the Government's case was uncontradicted that the Chochems had advanced to petitioner during the year in question a total of $22,230.92 [Ex. B, R. 74, 522; Ex. 8, R. 44, 519, 520, 521, 522; Ex. F, R. 255, 256, 257; Ex. G, R. 346; Ex. H, R. 499-501; Ex. O, R. 525, 526, 527; Ex. Q, R. 594, 595, 596].

Esther Chochem testified that she lent petitioner $25,000.00 or $26,000.00 during 1943 [R. 248]. Her testimony was conclusively corroborated by documentary evidence showing the advances to petitioner.

The B & C Manufacturing Co., owned by the Chochems [R. 581], transferred $1,500.00 to Super-Built Furniture Manufacturing Co. on November 19, 1943 [R. 519-524]. This was shown by Exhibit B [R. 74], which was a bank statement of the B & C Manufacturing Co. at the Bank of America, and it showed the withdrawal of the $1,500.00. Exhibit 8 [R. 44, 519, 522] was a deposit slip of the Super-Built Furniture Manufacturing Co. for November 19, 1943, showing the $1,500.00 deposited in that account [R. 519-524].

Esther Chochems advanced to petitioner four checks, in the amounts of $144.00, $1,375.00, $850.00, and $3,059.92, all totalling $5,428.92, to purchase merchandise [Ex. F, R. 257, 255, 256].

Esther Chochems contributed $3,000.00 in cash to the partnership formed by Max Bloom and herself under the name of "Allied Furniture So." [Ex. G, R. 346]. This $3,000.00 the revenue agent treated as income to peti-

tioner because he could not determine the source of the money.

The sum of $5,569.25 was deposited into Lloyds escrow by the Charles Furniture Co., owned by the Chochems [Ex. H, 499-501.] This exhibit consisted of the books of the Charles Furniture Co. showing the disbursement of the funds. The revenue agent admitted that he examined the books of the Charles Furniture Co., but did not check as to the source of this item [R. 500].

Ben's Furniture Co., owned by the Chochems, paid into the Genessee Street duplex escrow the amount of $2,000.00 [Ex. O, R. 525, 526]. This exhibit was a check from Ben's Furniture Co. to Charles Furniture Co., both owned by the Chochems, and endorsed by the Charles Furniture Co. On the check was the number of the Genesee Street duplex escrow, viz., ESC 377-1514 [R. 527].

Also advanced by the Chochems to petitioner during 1943 were four checks, in the amounts of $1,000.00, $1,000.00, $1,732.75, and $1,000.00, totalling $4,732.75 [Ex. Q, R. 596, 594, 595].

All of these sums, Exhibits B, F, G, H, O, and Q, totalled $22,230.92, and the record is devoid of any evidence indicating that these were not in fact loans to petitioner. The revenue agent admitted that petitioner told him, when a statement was being given that he owed money to the Chochems [R. 630].

It should be noted that the total amount of these loans, $22,230.92, is only $275.24 less than the amount of the total net income set up by the revenue agent in his computations. By his interpretation of the bank deposit theory, the revenue agent necessarily treated these loans

as income to petitioner. He did so on the premises that he was unable to identify the source of the expenditures in connection with the purchase of the various businesses heretofore mentioned. In so doing, he was, in effect, setting up loans to petitioner as income and shifting the burden to petitioner to show that the expenditures were actually loans.

It is also significant that the revenue agent admitted on cross-examination that petitioner had told him in his statement that he owed the Chochems money and had arrived at a figure of $30,000.00 for settlement purposes [R. 592]. The revenue agent also admitted that petitioner told him that he repaid the Chochems $17,500.00 in 1945 by purchasing an interest in the Santa Rita Hotel in the name of Corinne Chochem [R. 634].

All of the evidence, both documentary and oral, relating to the loans by the Chochems to petitioner was in evidence before the Government closed its case, and was called to the Court's attention at the time of the motion for judgment of acquittal. The Government's position appeared to be that under the bank deposit theory the revenue agent had to set up these loans as income in the absence of an explanation by petitioner. This, of course, was nothing more than an attempt to shift the burden of proof to the defendant. At that phase of the case there should have been substantial evidence sufficient to go to the jury for its determination as to whether or not such expenditures were actually income. There was no evidence to prove that the expenditures were income, except the revenue

agent's testimony that he had treated the expenditures as income of petitioner because he could not determine the source of such expenditures. On the other hand, there was substantial evidence, both oral and documentary, to show that petitioner had received loans during 1943 from the Chochems which would have accounted for the net income set up by the revenue agent.

The Government having offered no evidence to disprove the loans made to petitioner, it was certainly not in a position to contend that the evidence excluded every reasonable hypothesis except the guilt of the petitioner, as is required where the evidence is circumstantial. On the contrary, the only reasonable hypothesis which could be supported by the evidence was that the income set up by the revenue agent was in fact money loaned to petitioner. The Government certainly did not exclude all available sources from which the expenditures could have been derived, and this was required in order to make out a case sufficient to successfully oppose a motion for a judgment of acquittal.

The courts have clearly indicated that a motion for a judgment of acquittal should be granted under such circumstances. (See *Kirsch v. United States,* 8th Cir., 174 F. 2d 595; *United States v. Fenwick,* 7th Cir., 177 F. 2d 488; *Bryan v. United States,* 5th Cir., 175 F. 2d 233 (affirmed 338 U. S. 552, 94 L. Ed. 335, 70 S. C. 317); *United States v. Berman* (D. C., N. D. Ga.), 75 Fed. Supp. 789; *United States v. Chapman,* 7th Cir., 168 F. 2d 997, 1001.)

C. Specifically, the Court of Appeals for the Ninth Circuit Erred in Holding That the Evidence Was Sufficient to Go to the Jury Where the Only Evidence Offered to Prove the Alleged Income Upon Which the Case Was Predicated Consisted of Bank Deposits and Expenditures Which the Uncontradicted Evidence Showed Were Actually Loans to Petitioner but Which the Revenue Agent Testified on Cross-examination He Was Compelled to Treat as Income, Under the Bank Deposit Theory, Unless They Were Shown to Have Been Repaid During the Year in Question.

After evidence of the loans by the Chochems to petitioner was introduced, the revenue agent endeavored to justify his including such loans in his computation of deposits upon the proposition that he was compelled to treat loans as income under the bank deposit theory unless such loans were shown to have been repaid during the year in question [R. 492, 572-574].

An examination of this proposition readily discloses that the prosecution's concept of the bank deposit theory was that every sum of money which might be directly or indirectly connected in some way with petitioner would be considered as gross income. From that would be deducted what the revenue agent in his judgment considered to be exchanges, duplicate deposits, and the cost of doing business. The Government would then rest its case and require the defendant to assume the burden of proof and show that such deposits or expenditures were not in fact income. In other words, the revenue agent's concept of the bank deposit theory was to include everything in

deposits, whether it be loans, gifts, or moneys which might have been earned in previous years.

The evidence relating to the loans has been set forth in detail under Specification of Error B and will not be set forth again here. It would appear to follow that the revenue agent's attempt to justify his inclusion of such loans as income unless they had been repaid during the year carried with it an implicit admission that he was aware of such loans.

The revenue agent did contend that he had to include loans as income unless it was shown that they were repaid during the taxable year 1943. The record in this case discloses:

> "Q. If Mr. Gendelman had received a couple of thousand dollars as a loan from a friend and put it in that account you would have set it up as income? A. If I didn't know the source of that money, yes, sir." [R. 492.]

The revenue agent was questioned concerning Exhibit O [R. 525], which was a $2,000.00 check from Ben's Furniture Co., and which was used in the Genesee duplex escrow. This was unquestionably a loan. He testified:

> "Q. Wait a minute. I don't think you understood me. Did you allow—did you treat this $2,000 as income to Julius Gendelman? A. That is the first time I saw that check but in effect I treated that as income to Julius Gendelman.
>
> Q. If you had had that check would you have done so? A. That depends on the circumstances.

Q. What circumstances? A. That might have been repaid the next day. I have no way of knowing the complete transaction, Mr. Carr." [R. 527, 528.]

The revenue agent was also cross-examined respecting Exhibit B [R. 74], which was a $1,500.00 check from the B & C Manufacturing Co., owned by the Chochems, to Super-Built Furniture Manufacturing Co., on November 19, 1943. This also was without question a loan. The revenue agent testified:

"Q. All right, let us make a check mark on that. The next item is $1,500. Do you still contend that that is income to Julius Gendelman? A. It is part of the gross income, yes, sir.

Q. Well, now, we are not dealing with the gross at the moment—we are dealing with net now, aren't we? A. If that item was not repaid before the end of the year we are dealing with net income.

Q. Do you know whether it was repaid? A. No, sir." [R. 572.]

He further testified:

"Q. But if it came from somebody like Esther Chochem or Julius Gendelman borrowed it then you wouldn't make that deduction? A. If it were not repaid by the end of the year, yes, sir." [R. 574.]

From the foregoing testimony it appears obvious that there was included in the revenue agent's computations of net income loans received by petitioner or his wife during

1943. Such a position serves to point up the fallacy of the bank deposit theory, as it was used in this case. Upon no conceivable theory can loans be classified as income. Borrowed money cannot be income under any circumstances. Whether such loans are paid during the year in question or at a later time or are not paid at all is of no consequence. The attempt to convert loans into income is absurd on its face, and is contrary to law and common sense.

It was not until after evidence of the loans was introduced that the revenue agent advanced the theory that such loans would have to be treated as income, under the bank deposit theory, unless it was shown that they were repaid during the year. Whether he was mistaken as to his interpretation of the bank deposit theory or was merely endeavoring to extricate himself from an awkward situation cannot be determined. It is apparent, however, that his after-thought was wholly without substance and without foundation in reason or law. (See *Kirsch v. United States,* 8th Cir., 174 F. 2d 595; *United States v. Fenwick,* 7th Cir., 177 F. 2d 488; *Bryan v. United States,* 5th Cir., 175 F. 2d 233 (affirmed 338 U. S. 552, 94 L. Ed. 335, 70 S. C. 317); *United States v. Berman* (D. C., N. D., Ga.), 75 Fed. Supp. 789; *United States v. Chapman,* 7th Cir., 168 F. 2d 997, 1001.)

SPECIFICATION OF ERROR II.

The Court of Appeals for the Ninth Circuit Erred in Affirming the Judgment of Conviction of Petitioner on Both Counts I and II of the Indictment and in Upholding the Ruling of the Lower Court Permitting the Revenue Agent to Testify That Petitioner's Net Worth on January 1, 1943, Was $15,031.67 and at the End of 1943 Was $48,-130.94, Over the Objection of Petitioner That the Computations Were Not Based Upon Any Evidence Which Had Been Offered in the Trial, Were Mere Conclusions of the Witness, and Would Be Prejudicial to Petitioner [R. 602, 603, 605].

The Government first offered what purported to be a net worth statement prepared by the revenue agent, and after objection by petitioner, the Court refused to permit it to be shown to the jury [R. 601, 602]. The revenue agent was then allowed to testify that petitioner had a net worth at the beginning of 1943 of $15,031.67 and at the end of the year of $48,130.94. He testified that the difference represented net assets of $33,099.27 [R. 605].

The revenue agent did not testify as to how he computed the net worth statement, nor did he describe or enumerate either the assets or the liabilities of petitioner. The Court permitted the revenue agent to give his bald conclusions as to the net worth of petitioner, without explaining or setting forth the items upon which the so-called net worth was based. It was thus left to petitioner to develop by cross-examination, in so far as he could, what assets and liabilities of petitioner were included in such net worth figures.

On cross-examination the revenue agent testified that he set up no liabilities for petitioner except on his home [R.

628]. Nor did he set up any liabilities for repayment of the loans advanced by the Chochems [R. 630]. Whether the alleged assets were real estate, notes, bonds, cash, stock, loans receivable, jewelry, annuities, merchandise, savings accounts, or other properties of any kind, the evidence did not disclose.

The revenue agent also admitted on cross-examination that petitioner had told him about owing money to the Chochems and that he had arrived at a figure of $30,000.00 as a settlement basis for what he owed the Chochems [R. 631]. He also admitted that petitioner had told him that petitioner had purchased a one-half interest in the Santa Rita hotel and by that method had repaid the Chochems $17,500.00 on his indebtedness in 1945 [R. 632].

The revenue agent also admitted that he had not examined the books and records of four of the business concerns which the Government contended were owned by petitioner [R. 370, 371].

The evidence respecting the loans, totalling $22,230.92, has been set forth in detail under Specification of Error I-B and will not be repeated here. Suffice it to say that the evidence at the close of the Government's case was uncontradicted that the above amount had been advanced by the Chochems to petitioner during the year 1943.

The Court of Appeals for the Ninth Circuit, in affirming the judgment of conviction, upheld the lower court's ruling admitting the testimony of net worth by the revenue agent. This decision is in direct conflict with the decisions of at least two other Courts of Appeals. (See *Bryan v. United States*, 5th Cir., 175 F. 2d 223 (affirmed 338 U. S. 552, 94 L. Ed. 335, 70 S. C. 317); *United States v. Fen-*

wick, 7th Cir., 177 F. 2d 488.) In both of these cases judgments of conviction were reversed because the net worth computations were not clearly and accurately established by competent evidence. In the *Bryan* case the Court said, at page 255:

> "The net worth-expenditures method of establishing net income, sought to be applied in this case, is effective only if the computations of net worth at the beginning and at the end of the questioned periods can reasonably be accepted as accurate."

And again the Court said, at page 226:

> "These admissions are serious in this case because the Government must rely almost entirely upon circumstantial evidence, that is to say, upon the circumstance of the expenditure of considerably more money in the years in question than the defendant took in from the operation of his night clubs and gambling enterprises. The evidence, being circumstantial, must exclude every reasonable hypothesis other than guilt of the defendant. The jury no doubt disbelieved, and had the right to disbelieve, Mrs. Bryan's testimony, but in view of the auditor's admissions that he was not able to say that his computation included all of the assets of the defendant at the beginning of the period, together with the absence of any admissions, records, financial statements, bookkeeping entries, or other findings, or evidence, tending to bind the defendant as to the lack of additional assets at the beginning of the tax period, the evidence, in the light of the bill of particulars, was insufficient to make out a *prima facie* case against the defendant on the net worth-expenditure basis, and *the case should not have been submitted to the jury since it did not exclude the hypothesis that the funds used in making some of the expenditures might have been from sources other than current business income.*" (Emphasis supplied.)

In *United States v. Fenwick,* 7th Cir., 177 F. 2d 488, the Court reversed a judgment of conviction for income tax evasion where the Government attempted to establish its case upon the net worth basis. The Court points out on page 490:

> "The weakness of the government's position, stressed by defendant, is the uncertainty of the propriety of the finding of defendant's net worth at the beginning of 1943. Of course, before the increased net worth method of proof is effective, the net worth of the taxpayer at the beginning of the tax year must be clearly and accurately established by competent evidence. Bryan v. United States, 5 Cir., 175 F. 2d 223; United States v. Chapman, 7 Cir., 168 F. 2d 997, 1001; United States v. Skidmore, 7 Cir., 123 F. 2d 604, 608."

And again on page 491:

> *"As we have said, when the government relies upon the circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion, it must produce evidence that excludes all possible available sources of taxable income from which the increased net worth and the excess expenditures could have been derived.* Thus in Bryan v. United States, 5 Cir., 175 F. 2d 223, 225, the court said: 'The net worth-expenditures method of establishing net income, sought to be applied in this case, is effective only if the computations of net worth at the beginning and at the end of the questioned periods can reasonably be accepted as accurate. Since . . . no claim of evasion is based upon the deductions from gross income reported by the defendant, and since there is no evidence that the gross expenditures by the defendant in any year were made entirely from gross income

of the business operations in such year, it was essential for the Government to present evidence that excluded, or tended to exclude, all other available sources from which the additional funds expended could have been derived. If the defendant correctly reported his gross income, then a very substantial part of the expenditures was obliged to have been made from funds other than such current income and from sources not covered by the returns or the records of the defendant or included by the Government's computations of net worth, . . . the Government must rely almost entirely upon circumstantial evidence, that is to say, upon the circumstance of the expenditure of considerably more money in the years in question than the defendant took in. . . . The evidence, being circumstantial, must exclude every reasonable hypothesis other than the guilt of the defendant . . . the case should not have been submitted to the jury since it did not exclude the hypothesis that the funds used in making some of the expenditures might have been from sources other than current business income.' This supports the decision of this court in United States v. Chapman, 7 Cir., 168 F. 2d 997, 1001. Remembering that the government has the burden of proof in a criminal case, that the burden never shifts to the defendant, *that circumstantial evidence must be of such character as to exclude every reasonable hypothesis except that of guilt, it necessarily follows that, when the government relies upon circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion, the basic net worth must be established.* The defendant is not compelled to take the witness stand; he is not compelled to make proof that he is innocent, but he must be proved guilty by the evidence beyond all

reasonable doubt, and where there is uncertainty to whether all the assets of defendant are includ in the government's computation of net worth, follows that its computations cannot be relied o *Essential proof of no other assets is the cornersto of the evidence of the government; that cornersto being faulty, the whole edifice is so weakened as be undependable as proof of guilt beyond all reaso able doubt."* (Emphasis supplied.)

The danger of permitting a revenue agent to merel state the net worth of a defendant at the beginning an end of a year without further explanation appears obv ous. His testimony, in so far as the record in this cas is concerned, could have been a pure guess. Since h was testifying as an expert for the Government, the jur would undoubtedly give great weight to his testimony His testimony respecting net worth, which was offered t corroborate his computations of net income, in all proba bility was a deciding factor in the minds of the jury i determining the guilt of petitioner. In any event, such testimony must have had a persuasive effect upon the jury, to the prejudice of petitioner.

Both the *Bryan* and the *Fenwick* cases, *supra,* clearly point out that before the increased net worth method of proof is effective, the net worth of the taxpayer at the beginning of the tax year must be clearly and accurately established by competent evidence. Here the Government produced only the bare statements of a revenue agent as to net worth at the beginning and end of the year, without offering any evidence whatsoever as to what assets or lia-

bilities were considered by the revenue agent in computing the net worth. As pointed out in the *Fenwick* case, *supra*, the burden of proof never shifts to the defendant, and circumstantial evidence must be of such a character as to exclude every reasonable hypothesis except that of guilt. Furthermore, when the Government relies upon circumstances of increased net worth, the basic net worth must be established by competent evidence. The evidence in the instant case was wholly insufficient to meet this test.

Under the decision of the Court of Appeals for the Ninth Circuit affirming the judgment in this case, the Government would be at liberty to call a revenue agent and have him testify as to a defendant's net worth without producing any evidence to show upon what his net worth computations were based. The defendant would then be required to take the burden of proof and show that the net worth computations of the revenue agent were incorrect. This certainly appears to be shifting the burden of proof to a defendant. Furthermore, such a method of proving a criminal case offers too great an opportunity to catch a defendant by surprise. It is entirely possible that the net worth computations of a revenue agent may be wholly and completely inaccurate, by reason of lack of access to information concerning assets and liabilities of a defendant, as was demonstrated in this case in connection with the loans from the Chochems. Also, it should be kept in mind that the revenue agent here did not examine the books and records of four of the companies claimed by the Government to be owned by petitioner [R. 370, 371]. It seems pertinent to inquire how there can be a computation of assets and liabilities without access to all the books and records of petitioner.

The Court of Appeals for the Ninth Circuit in its decision approved the ruling of the lower Court in admitting the testimony of the revenue agent as to the net worth of petitioner, on the authority of *United States v. Johnson,* 319 U. S. 503 [R. 712].

It is important to note that in that case the agent was testifying as an expert concerning his computations of the amount of tax due, and not concerning defendant's net worth. Furthermore, as this Court pointed out, on page 519 of the Opinion, the computations were based "on substantially the entire evidence in the record as to Johnson's income." Computations of tax, based on evidence introduced in a trial, while hypothetical to some extent, are merely mathematical calculations, whereas in the case of a net worth statement the net worth of the taxpayer at the beginning of the tax year must be clearly and accurately established by competent evidence. If there is uncertainty as to whether all of the assets and liabilities are included, it follows that the computations cannot be relied on. Such was the situation in the instant case. It is submitted that the Court of Appeals for the Ninth Circuit erred in affirming the judgment of conviction, because of the error committed by the lower court in admitting the evidence relative to net worth.

In the Opinion of the Court of Appeals for the Ninth Circuit [R. 711], the Court said:

> "The evidence of the assets held by appellant in others' names, the large amount of funds at his dis-

posal, and *without explanation as to the source . . .* was in our opinion sufficient to justify submission of the case to the jury." (Emphasis supplied.)

This is the first case, to petitioner's knowledge, where a court has placed the burden on the defendant, in a criminal tax case, to explain funds in his possession. Mere possession of moneys alone cannot support an inference of income where the Government is required to prove its case beyond a reasonable doubt. It may well be that a person could be in possession of considerable sums of money from various sources, through gift, inheritance, loans, deposits, or moneys accumulated in previous years. To permit a case to go to the jury because the defendant has not explained the source of such moneys clearly shifts the burden of proof and deprives him of basic concepts inherent in our constitutional system, such as the presumption of innocence and the requirement that the defendant must be proved guilty beyond a reasonable doubt.

The Opinion of the Court necessarily approves the theory upon which the case was prosecuted in the court below, namely, that where the revenue agent is unable to determine the source of deposits and expenditures, he may treat the same as income and place the burden upon the defendant to explain the source of the funds or run the risk of having his failure to do so result in his conviction for the crime of evading income tax. This, it is submitted, is not in accord with the rules applicable in criminal trials in the Federal Courts of this country.

Conclusion.

This case involved a relatively small amount of claimed additional tax, which had no connection with any illegal activities but related to several businesses, the ownership of some of which was open to doubt. The case was predicated almost entirely upon the testimony of a revenue agent, whose theories respecting the classification of deposits and expenditures have been thoroughly explored in this brief. Petitioner submits that the decision below should be reversed and the judgment of conviction on both counts of the indictment set aside.

Respectfully submitted,

CHARLES H. CARR,
Attorney for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 434

JULIUS GENDELMAN, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The Distrit Court rendered no opinion. The opinion of the Court of Appeals (R. 706-712) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 19, 1951. (R. 713.) The petition for a writ of certiorari was filed on November 19, 1951. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1). See also Rules 37(b)(2) and 45(a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Was the evidence sufficient to sustain the verdict?

2. Was it error to admit evidence of petitioner's net worth?

STATUTE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * * * *

(26 U.S.C. 1946 ed., Sec. 145.)

STATEMENT

Petitioner was indicted on March 8, 1950, in the United States District Court for the Southern Dis-

trict of California on two counts. (R. 3-5.) Count one charged that petitioner wilfully attempted to defeat and evade his individual income and victory taxes for 1943 by filing a false and fraudulent return wherein he stated that his net income, computed on the community property basis, was $2,593.38, and that the income and victory tax thereon was $401.25; whereas his income for the year 1943, computed on the community property basis, was $10,839.90 and the tax due was $2,913.85. (R. 3-4.)

Count two charged that petitioner wilfully attempted to evade and defeat a large part of the income and victory taxes of his wife, Edythe Gendelman, for the year 1943 by causing to be filed on her behalf a false and fraudulent return in which it was stated that her net income for the year, computed on the community property basis, was $2,593.37, and the tax due thereon was $398.87; whereas, her net income for the year, computed on a community property basis, was $10,839.90, and the tax due was $2,913.85. (R. 4-5.)

A motion for acquittal was made at the conclusion of the Government's case (R. 652, 660) and was denied (R. 654, 661). The motion was renewed at the close of the defense and again denied. (R. 673.) After denying the motion for acquittal and for a new trial (R. 14-15) the court sentenced the petitioner to imprisonment for a term of ten months on each count, to run concurrently (R. 15-17).

Petitioner was engaged in the manufacture and sale of furniture during the year 1943, the two principal businesses operated by him during the year being the Modern Furniture and Upholstering Company, Inc., a corporation, and Super-Built Furniture Manufacturing Company, a sole proprietorship, which succeeded the former company on June 30, 1943. (R. 340-341, 388.) Both concerns were engaged in manufacturing furniture, and in order to provide sales outlets for their products, petitioner purchased or opened retail stores which he operated for various periods of time. (R. 410-411.)

Petitioner and his wife were the actual owners of the entire interest in the Modern Furniture and Upholstering Company, Inc., during the period of its existence. (R. 336-340, 362-365, 403-404, 408; Ex. 34, 46B, 47.) This company was consolidated with Super-Built Furniture Manufacturing Company on June 30, 1943 (R. 340-341, 388), the legal title being placed in the name of Esther Chochem (R. 390), although petitioner was actually the owner (R. 404, Ex. 34). The net income of the company of $9,286.75 was reflected on the income tax return of Esther Chochem for 1943. In answer to a request by the Government for information as to the true ownership of his enterprises in the name of Esther Chochem, petitioner made the following signed statement: "Esther Chochem was the owner of the legal title to the property of the

business operated under the name of Super-Built Furniture Mfg. Co., but the income therefrom was received by Julius Gendelman, to whom it really belonged". (R. 709, Ex. 44.) The income from Super-Built was not reported on petitioner's 1943 return.

Petitioner also owned Modern Furniture Company, a retail store, until April, 1943 (R. 397-399) when it was sold to Standard Furniture Company. Its operations were reflected on the books of Modern Furniture and Upholstering Company, Inc., and when this retail outlet was sold, a part of the consideration was made payable to Lloyds Furniture Company. (R. 501-504.)

Manufacturers Furniture Outlet, a retail store, was owned and operated by petitioner until March 2, 1943 (R. 408, 415, 438, Ex. 34) when it was sold to Louis Mandell (R. 107-110).

L. A. Mode Furniture Manufacturing Company, a furniture manufacturing company, was in existence from February 22, 1943 to June 30, 1943, when it was sold to Super-Built Furniture Manufacturing Company. (R. 408, 388-389, Ex. 34.) Title to this business was in the name of Mrs. Gendelman (R. 389), and a loss of $1,281.22 shown on the company records was claimed by petitioner and his wife on their income tax returns (Ex. 2, 3).

Lloyds Furniture Company, a retail outlet, was operated from on or about January 22, to May 26, 1943. (R. 408, 436, 438, Ex. 34.) Title to the busi-

ness was in the name of Esther Chochem, both in the purchase and sale of the business, but the petitioner was the owner. (R. 408, 493.)

J and S Sales Company, a wholesale outlet, was operated in August and September, 1943, as a partnership between petitioner and Joseph J. Sherline. (R. 198-199, 396.) The petitioner furnished materials for assembly of living room suites, and Sherline sold the merchandise. (R. 199-200.)

Allied Furniture Company, a retail store, was owned and operated by petitioner until December, 1943. (R. 78, 397.)

During 1943 petitioner had no personal bank accounts in his own name. (R. 621-622.) He utilized three commercial and two savings bank accounts of Edythe Gendelman, his wife, in three separate banks. (R. 46-48, 58-62, Ex. 9-14, 20-22.) He held a power of attorney over a commercial account in the name of his aunt, Esther Chochem (R. 64, 66, 68, Ex. 23), and he also used another commercial account and two savings accounts in the name of Esther Chochem (R. 49, 51, 436, 443-447, Ex. 15-17). He held a power of attorney on a commercial account in the name of Corrine Chochem, daughter of Esther Chochem. (R. 52, 436, Ex. 18.) In addition, he held a power of attorney over a commercial account in the name of Lloyds Furniture Company, title to which business was in the name of Esther Chochem. (R. 70-71, 437-438, Ex. 24.)

Bank deposits made to the various Chochem accounts were traced as emanating from the sales of

merchandise by the manufacturing and retail concerns owned by petitioner, and from the sales of the retail stores themselves. These deposits were identified as (1) sale of merchandise amounting to $1,844.00 (R. 545-546) paid by State Investment Company checks (Ex. 5); (2) sale of Manufactures Furniture Outlet retail store to Louis Mandel for $7,600 (R. 541-542, Ex. 29); (3) sale of $1,080 merchandise to Orn's Furniture Company (R. 113-114, 121, 415-417; Ex. 30); (4) sale of merchandise to J & S Sales Company of $3,981.64 (Ex. 32A-32H); (5) sale of merchandise by J & S Sales Company of $1,704 (R. 128-129, 449). Deposits of $1,080 and $3,121.45 to Lloyds Furniture Company account were identified as a sale of merchandise to Orn's Furniture Company (R. 115-124), and sale of the retail store, Modern Furniture Company (R. 32, 36, 504, Ex. 1). These deposits were listed in petitioner's books as loans payable, and were later transferred from the loans payable to the capital account. (R. 393, 549, 552, 561.)

In addition to the bank deposits, the petitioner had available undeposited funds which were used to pay off loans of $4,424.45 and $744 (R. 463-464); to invest in automobiles and trucks in the amount of $3,485 (R. 465, 510, 511) and to pay into various escrow accounts (R. 466, 467, 525-527). None of the foregoing amounts were reflected on his books or income tax returns, and when his accountant made out income tax returns for 1943 the peti-

tioner stated that he did not have any other income. (R. 160-161.)

From analysis of the bank accounts utilized by petitioner and undeposited funds available to him which were not reflected on his books or income tax returns, the revenue agent computed additional unreported net community income of $22,506.16. (R. 475.) To corroborate the results of the bank deposit analysis, the revenue agent made a net worth analysis which showed that, based on the evidence and records, petitioner's net worth on January 1, 1943 was $15,031.67 and at the end of 1943 it was $48,130.94, or an increase in net assets of $33,099.27. (R. 604-607.)

ARGUMENT

Petitioner contends that the evidence was insufficient to support the verdict and that the trial court erred in not granting his motion for a judgment of acquittal.

A summary review of the evidence shows that none of petitioner's numerous business enterprises were carried on in his own name, and that none of the numerous bank accounts over which he exercised control were in his own name. In a signed statement he admitted that Super-Built Furniture Manufacturing Company belonged to him, yet the income from this source was not reported by him. Bank deposits which were listed in his books as loans payable were actually proved to have been income from the sale of merchandise, and were shown to have been later transferred from the

loans payable account to the drawing account. Based on these bank deposits, the unreported income was computed at $22,506.16 as compared with $5,186.75 total reported by both petitioner and his wife.

In corroboration of the computation of income by the analysis of bank deposits, the Government introduced a net worth summary which compared petitioner's financial position as of January 1, 1943, with his position as of December 31, 1943. The minimum amount of unreported income thus determined was $19,627.64.

There was evidence not only that there was an understatement of income but that petitioner's conduct was wilful, as shown by the concealment of his assets in placing them in the names of others, in making false entries on his books, and in handling his affairs in such manner that usual records were not made. *Spies* v. *United States,* 317 U.S. 492, 499.

The only defense offered was introduced through cross examination of Government witnesses, that certain items were not properly included in the estimate of petitioner's income; that certain questionable accounting entries resulted from mistakes of employees; and that admissions made in his signed statement were not in fact true. Disputed issues of fact were thus presented, and as pointed out by the court below (R. 710-711), neither the petitioner's admissions nor the bank deposits stood

alone as the sole proof of tax due and deliberately omitted from his return. As the court said (R. 711):

> The evidence of the assets held by appellant in others' names, the large amount of funds at his disposal and without explanation as to source, the questionable bookkeeping entries, the increase in his net worth during the year, all considered in light of the taxpayer's own admissions, was in our opinion sufficient evidence to justify submission of the case to the jury. *United States* v. *Johnson, supra,* [319 U.S. 503] at page 518.

Because the petitioner kept no records for some of his business activities, or if he kept them, failed to make all of his records available (R. 370-372) and because other books were incomplete or erroneous (R. 327-329, 418, 465-468) the revenue agent was compelled to compute petitioner's income by analysis of bank accounts. Petitioner contends that this was insufficient to take the case to a jury. **(Pet. 12.)**

The rule in such cases, as stated in *Gleckman* v. *United States,* 80 F. 2d 394 (C.A. 8th), certiorari denied, 297 U.S. 709, is that the Government's proof must establish the existence of a business of a lucrative nature, periodic deposits in bank accounts over which the taxpayer exercises dominion and control, and that the income was current. The

proof in this case clearly satisfies these tests. The use of bank deposits to compute income has been approved in a long line of cases, including: *Stinnett* v. *United States,* 173 F. 2d 129 (C.A. 4th), certiorari denied, 337 U.S. 957; *United States* v. *Venuto,* 182 F. 2d 519 (C.A. 3d); *Jelaza* v. *United States,* 179 F. 2d 202 (C.A. 4th); *Barcott* v. *United States,* 169 F. 2d 929 (C.A. 9th), certiorari denied, 336 U.S. 912; *Buttermore* v. *United States,* 180 F. 2d 853 (C.A. 6th); *Capone* v. *United States,* 51 F. 2d 609 (C.A. 7th), certiorari denied, 284 U.S. 669; *Chadick* v. *United States,* 77 F. 2d 961 (C.A. 3d); *Guzik* v. *United States,* 54 F. 2d 618 (C.A. 7th), certiorari denied, 285 U.S. 545; *Malone* v. *United States,* 94 F. 2d 281 (C.A. 7th), certiorari denied, 304 U.S. 562; *Oliver* v. *United States,* 54 F. 2d 48 (C.A. 7th), certiorari denied, 285 U.S. 543; *Paschen* v. *United States,* 70 F. 2d 491 (C.A. 7th); *Orzechowski* v. *United States,* 37 F. 2d 713 (C.A. 3d); *Singer* v. *United States,* 58 F. 2d 74 (C.A. 3d); *United States* v. *Miro,* 60 F. 2d 58 (C.A. 2d); *United States* v. *Zimmerman,* 108 F. 2d 370 (C.A. 7th); *Hanson* v. *United States,* 186 F. 2d 61 (C.A. 8th).

The case of *Kirsch* v. *United States,* 174 F. 2d 595 (C.A. 8th), upon which petitioner relies, is clearly distinguishable because the Government's own testimony in that case showed that the deposits could not be identified as income, whereas in the instant case numerous deposits were traced directly

from sales made by petitioner. (R. 106-121, 415-417, 541-549, Ex. 1, 5, 29, 30, 31, 32.) The other cases cited by petitioner did not involve the use of current bank deposits as a means of determining income. (See *infra* pp. 12-13.)

Petitioner also contends that it was an error to permit the revenue agent to testify as to his net worth increase during the year 1943. The witness was qualified as an expert witness (R. 325-326); and his analysis of the petitioner's increase in net worth was based upon the evidence and testimony previously introduced (R. 602). The use of the increase in net worth method to compute income in the absence of adequate records has been approved in numerous cases, including *United States* v. *Johnson,* 319 U.S. 503, rehearing denied, 320 U.S. 808; *United States* v. *Skidmore,* 123 F. 2d 604 (C.A. 7th), certiorari denied, 315 U.S. 800; *United States* v. *Chapman,* 168 F. 2d 997 (C.A. 7th), certiorari denied, 335 U.S. 853; *Barcott* v. *United States,* 169 F. 2d 929 (C.A. 9th), certiorari denied, 336 U. S. 912; *Schuermann* v. *United States,* 174 F. 2d 397 (C.A. 8th), certiorari denied, 338 U.S. 831. The use of net worth analysis to corroborate other evidence of increased income has also been approved in *Leeby* v. *United States* (C.A. 8th), decided November 13, 1951 (1951 C.C.H., par. 9497); *Gariepy* v. *United States,* 189 F. 2d 459 (C.A. 6th); *Hanson* v. *United States,* 186 F. 2d 61 (C.A. 8th).

The cases of *Bryan* v. *United States,* 175 F. 2d 223 (C.A. 5th), affirmed, 338 U.S. 552, and *United*

States v. *Fenwick*, 177 F. 2d 488 (C.A. 7th) are clearly distinguishable. In neither case was there direct proof of unreported income, as was established here. Both cases relied exclusively upon the agents' computations of net worth, whereas in the instant case it was merely corroborative of evidence established by other means. Finally, in the *Bryan* case, the revenue agent frankly admitted that he did not know whether his computations contained all the assets of the defendant or not.

CONCLUSION

The decision of the court below is plainly correct and presents no conflicts. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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